dents that "the sum of $2.5 million paid by the respondents... was *not* for the land alone but also for the houses, water and electric facilities." That this misconception as to what constitutes "qualifying mining expenditure" was carried over to the High Court appears from the judgment, wherein the learned judge said "On appeal to the Special Commissioners, the respondents claimed that the sum of $2.5 million which they *paid as the purchase price... should have been treated as qualifying mining expenditure*", and further "the sole question for determination in this appeal is whether the respondents are entitled to have the sum of $2.5 million deducted from their gross income." and "the second reason given for the second condition not having been satisfied is that, even assuming that the $2.5 million is the *cost of Batu Tiga mine* and therefore capital expenditure within the meaning of rule 2(ii)(a) of the Income Tax (Mining Operations) Rules, 1949, *such expenditure was not expenditure incurred on or for the asset in connection with the working of the mine* as stipulated in paragraph 41 of Schedule 9. With all respect to the learned counsel for the appellant, this argument is a mere quibble. *The money was clearly paid for the acquisition of the mine*". When the judgment went further to say "The mine being the site of the source of mineral deposits, it was an asset on or for which the respondents had incurred the capital expenditure of $2.5 million." This overlooks the definition in paragraph 6 to Schedule 2, earlier quoted, that *the asset* referred to a mine *on or for which* the operator has incurred *"qualifying mining expenditure"* (not capital expenditure) *"in connection with or in preparation for the working of the mine"*.

I respectfully disagree, having regard to the definition of "mining asset" that "the mine being the site of the source of mineral deposits, it was an asset *on or for which the respondents had incurred* the capital expenditure of $2.5 million". That capital expenditure to qualify for deduction must be expenditure *"in connection with or in preparation for the working of the mine"*. I regret I cannot read "capital expenditure" in the 1949 Rules to include the capital expended for acquisition of mining land and hold the words "in connection with the carrying on of mining operations" to have been inserted without any intention to give them effect. Schedule 2, unlike the 1949 Rules, defines "Qualifying mining expenditure" and not "capital expenditure". Be that as it may, deductions that are permissible do not extend, in my view, to capital cost or consideration.

With respect to the learned judge and to the Special Commissioners, I am of the opinion that they have erred in law in treating consideration for the sale of Batu Tiga as qualifying mining expenditure within the meaning of paragraph 41 of Schedule 9 of the Income Tax Act, 1947, and as such, for purposes of Schedule 2, entitling them to deductions in respect thereof from the relevant gross income in the ascertainment of their adjusted income. I would accordingly allow the appeal and set aside the order of the High Court and of the Special Commissioners with costs here and in the court below.

It also follows that the cross-appeal must be dismissed but without costs, as it was necessitated by an error of the judge then to have awarded costs against the respondents when the appellant had not in effect succeeded in reversing the decision of the Special Commissioners but the judge had merely varied their decision.

Appeal allowed.

Solicitors: *Skrine & Co.*

NAJAR SINGH v. GOVERNMENT OF MALAYSIA & ANOR.

[F.C. L.P., Suffian C.J. and Ong Hock Sim F.J.)
February 15, 1974]

[Kuala Lumpur — Federal Court Civil Appeal No. 126 of 1973]

Administrative Law — Dismissal of police officer — Proceedings taken under Public Officers (Conduct and Discipline) (General Orders Chapter D) Regulations, 1969 — Reasonable opportunity to be heard — No oral hearing given — Federal Constitution, art. 132.

The appellant who was a police officer was detained under an order issued by the Minister of Home Affairs. Whilst in detention he received a statement in writing sent by the Police Force Commission pursuant to General Order 30(2) of the Public Officers (Conduct and Discipline) (General Orders, Chapter D) Regulations, 1969 requiring him to show cause why he should not be dismissed from the Police Force. The appellant sent a written reply to the Police Force Commission.

The appellant was dismissed from the police force and he sought *(inter alia)* a declaration that his dismissal was void. The High Court dismissed his claim ([1973] 2 M.L.J. 191) and the appellant appealed to the Federal Court.

Held, dismissing the appeal: (1) in this case although the respondents could have proceeded against the appellant either under the Public Officers (Conduct and Discipline) (General Orders Chapter D) Regulations, 1969 or the Police (Conduct and Discipline) (Junior Police Officers and Constables) Regulations, 1970, they were within their rights in choosing to proceed under the 1969 Regulations (Chapter D);

(2) in any case, even when proceeding against the appellant under the 1969 Regulations (Chapter D) the respondents should have given him a reasonable opportunity of being heard;

(3) in the circumstances of this case an oral hearing was unnecessary and the respondents had given the appellant a reasonable opportunity of being heard.

Cases referred to:-

(1) *Haji Ariffin* v. *Government of Pahang* [1969] 1 M.L.J. 6.
(2) *Surinder Singh Kanda* v. *Government of the Federation of Malaya* [1962] M.L.J. 169.
(3) *Ridge* v. *Baldwin* [1964] A.C. 40.
(4) *Durayappah* v. *Fernando* [1967] 2 A.C. 337.
(5) *Board of Education* v. *Rice* [1911] A.C. 179.
(6) *Mahadevan* v. *Anandarajan & Ors.* [1974] 1 M.L.J. 1.
(7) *Regina* v. *Aston University Senate, Ex parte Roffey & Anor.* [1969] 2 Q.B. 539.
(8) *Ceylon University* v. *Fernando* [1960] 1 W.L.R. 223.
(9) *Byrne* v. *Kinematograph Reuters Society Ltd.* [1958] 1 W.L.R. 762, 784; [1958] 2 All E.R. 579.

FEDERAL COURT.

N. A. Marjoribanks (*Lall Singh Makher* with him) for the appellant.

Mokhtar bin Haji Sidin (Senior Federal Consel), *Lim Beng Choon* (Senior Federal Counsel) with him, for the respondents.

Suffian C.J. (delivering judgment of the Court): The undisputed facts are as follows. The plaintiff (appellant before us) joined the Police Force as a Police Constable. In February 1968 he was confirmed in the rank of Sergeant Major and put on the pensionable establishment.

On 31st May, 1971, the Minister of Home Affairs acting under the Internal Security Act, 1960, detained him for two years from 7th June, 1971. On representations made by the plaintiff to the chairman of the Advisory Board on 6th June, 1971, the plaintiff was unconditionally released from detention on 25th January, 1972. (In our view nothing however turns on this.)

In July 1971 while in detention the plaintiff received a statement in writing sent by the Police Force Commission (which had power under the Constitution to dismiss him) pursuant to General Order 30(2) of the Public Officers (Conduct and Discipline) (General Orders, Chapter D) Regulations, 1969, published as P.U.(A) 273 of 1969. For convenience, we shall refer to these regulations as simply Cap. D. This statement dated 5th July, 1971, asked the plaintiff to show cause why he should not be dismissed from the Police Force.

The plaintiff forthwith sent a reply attempting to show cause why he should not be dismissed.

The plaintiff was dismissed from the Police Force by the Police Force Commission on 18th August, 1971.

It is admitted that there had been no "formal enquiry".

The plaintiff sued the Government of Malaysia as first defendant (first respondent before us) and the Chairman of the Police Force Commission as second defendant (second respondent before us), claiming a declaration that his dismissal was void, and for consequential relief.

The learned trial judge dismissed his claim in a judgment that has been reported, see [1973] 2 M.L.J. 191, and the plaintiff has appealed to us.

It is common ground that there were in force at the material time Cap. D and the Police (Conduct and Discipline) (Junior Police Officers and Constables) Regulations 1970, published as P.U.(A) 86 of 1970, which we shall refer to simply as the 1970 regulations.

The plaintiff, admittedly a junior police officer, contended that the 1970 regulations applied; that the procedure laid down in regulations 3, 4, 5 and 6 thereof should have been followed; and that as it was not followed, he had not been given a reasonable opportunity of being heard (he had not been given an oral hearing) and his dismissal was void. The defendants on the other hand contended that Cap. D applied and the plaintiff had in the circumstances been given a reasonable opportunity of making representations and being heard, and that an oral hearing was not necessary. The learned trial judge agreed with the defendants.

In our judgment there are three issues in this appeal:

(a) Where the defendants could have proceeded against the plaintiff either under Cap. D or the 1970 regulations, were they within their rights in choosing to proceed under Cap. D?

(b) When proceeding against the plaintiff under Cap. D, were they under a duty to give him a reasonable opportunity of being heard?

(c) If so, does it mean that the defendants should have given him an oral hearing?

Thus the court is not concerned with the question whether on the facts alleged and found by the defendants they were entitled to dismiss the plaintiff (indeed nobody has thought it necessary to tell the court what these facts were, as to which we are therefore completely in the dark); the court is concerned only with procedure and it seems to be agreed, at least by implication, that if the plaintiff had not been given a reasonable opportunity of being heard (whatever that expression means), then his dismissal is void.

With respect to the first issue, we are of the opinion that the learned trial judge was right in holding that where (as here) it was open to the defendants to proceed either under Cap. D or the 1970 regulations they were well within their rights in choosing to proceed under Cap. D, just as Government was within its right in *Haji Ariffin* v. *Government of Pahang*[1] in terminating a public servant's service rather than dismissing him when they could have done either. For this reason, we do not think it necessary to consider the plaintiff's further contention that the defendants should have proceeded under regulations 3, 4, 5 and 6.

With regard to the second issue, it was argued before us on behalf of the plaintiff that if Cap. D applied then nevertheless the plaintiff should under paragraph 27 thereof which reads —

"In all proceedings under this part no officer shall be dismissed unless he has been informed in writing of the grounds on which it is proposed to take action against him and has been afforded a reasonable opportunity of being heard."

have been allowed an oral hearing — meaning not merely that he should have been allowed (which he was) to try and exculpate himself in writing, but that he should have been allowed an opportunity of hearing and cross-examining witnesses against him, to give oral evidence himself and to call witnesses in his favour and to address the Commission, which it is admitted he was not allowed an opportunity to do.

The respondents on the other hand argued before us that paragraph 27 merely set out the policy while paragraph 30 under which the plaintiff was dismissed set out the procedure and that as the plaintiff had been dismissed under paragraph 30 he need not have been granted an oral hearing.

The learned trial judge held that the procedure followed by the Commission under paragraph 30 was fundamentally "a departure from the established procedure usually followed", but was nevertheless valid in view of the emergency which had been proclaimed as a result of the 13 May incidents.

Now paragraph 30 of Cap. D reads as follows —

"Procedure in dismissal and reduction in rank.

30. (1) Where it is represented to, or is found by, the appropriate Disciplinary Authority [in this case the Police Force Commission] or the Director-General of Public Services that an officer is guilty of unsatisfactory work or misconduct and

such work or misconduct, in the opinion of the Disciplinary Authority, merits dismissal or reduction in rank, the following provisions shall apply.

(2) The Disciplinary Authority shall after considering all the available information in its possession that there is a *prima facie* case for dismissal or reduction in rank, cause to be sent to the officer a statement in writing, prepared, if necessary, with the aid of the Legal Department, of the ground or grounds on which it is proposed to dismiss the officer or reduce him in rank and shall call upon him to state in writing [within] a period of not less than fourteen days a representation containing grounds upon which he relies to exculpate himself.

(3) If after consideration of the said representation furnished by the officer that Disciplinary Authority is of the opinion that the unsatisfactory work or conduct of the officer is not serious enough to warrant dismissal or reduction in rank, the Disciplinary Authority may impose upon the officer such punishment as it may deem fit.

(4) If the officer does not furnish any representation within the time fixed, or if he furnishes a representation which fails to exculpate himself to the satisfaction of the Disciplinary Authority, the Disciplinary Authority shall then proceed to consider and decide on the dismissal or reduction in rank of the officer.

(5) Where the Disciplinary Authority considers that the case against the officer requires further clarification, it may appoint a Committee of Inquiry consisting of not less than two senior Government officers who shall be selected with due regard to the standing of the officer concerned and to the nature and gravity of the complaints which are the subject of the inquiry, provided that an officer lower in rank than the officer who is the subject of the inquiry or the officers' Head of Department shall not be selected to be a member of the Committee.

(6) The officer shall be informed that, on a specified day, the question of his dismissal or reduction in rank will be brought before the Committee and that he will be allowed and, if the Committee shall so determine, shall be required to appear before the Committee and exculpate himself.

(7) If witnesses are examined by the Committee, the officer shall be given an opportunity of being present and of putting questions to the witnesses on his own behalf and no documentary evidence shall be used against him unless he has previously been supplied with a copy thereof or given access thereto.

(8) The Committee may, in its discretion, permit the Government or the officer to be represented by an officer in the Public Service or, in exceptional cases, by an advocate and solicitor and may at any time, subject to such adjournment as is reasonably necessary to enable the officer to present his case in person, withdraw such permission: Provided that where the Committee permits the Government to be represented, it shall also permit the officer to be similarly represented.

(9) If, during the course of the inquiry, further grounds of dismissal are disclosed, and the Disciplinary Authority thinks fit to proceed against the officer upon such grounds, the officer shall be furnished with a written statement thereof and the same steps shall be taken as are above prescribed in respect of the original grounds.

(10) The Committee having inquired into the matter, shall make a report to the Disciplinary Authority. If the Disciplinary Authority considers that the report should be amplified in any respect or that further inquiry is desirable, the matter may be referred back to the Committee for further inquiry and report.

(11) If, upon considering the report of the Committee, the Disciplinary Authority is of opinion —

(a) that the officer should be dismissed or reduced in rank, it shall forthwith direct accordingly;

(b) that the officer does not deserve to be dismissed or reduced in rank, but deserves some lesser punishment, it may inflict upon the officer such lesser punishment as it may deem fit; or

(c) that the proceedings disclose sufficient grounds for requiring him to retire in the public interest, it shall recommend to the Government accordingly. The question will be dealt with under the Pensions legislation."

With great respect to the respondents' arguments, we think that it is necessary in proceedings under paragraph 30 to give an accused officer a reasonable opportunity of being heard, because paragraph 27 of Cap. D referred to "all proceedings under this Part", meaning Part II of Cap. D, and proceedings under paragraph 30 are proceedings under Part II and therefore paragraph 27 governs proceedings even under paragraph 30. It will be noted that Cap. D was made by the Director of Operations under emergency powers and it was open to the Director to make any provision of Cap. D inconsistent with clause (2) of article 135 of the Constitution, but he did not do that; instead he repeated that clause in paragraph 27.

The next question is: was the plaintiff in the circumstances of this case given a reasonable opportunity of being heard? This involves consideration of the third issue.

As already stated, the plaintiff, though given a chance to explain in writing, was not given an oral hearing before his dismissal and it was argued that under paragraph 27 of Cap. D he should have been given an oral hearing. His counsel, Mr. Marjoribanks, cited passages from three cases which, he argued, made clear that the plaintiff was entitled to an oral hearing.

First, there was this passage from the advice of Lord Denning at page 172 in *Surinder Singh Kanda* v. *Government of the Federation of Malaya*: [2]

"If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statement have been made affecting him; and then he must be given a fair opportunity to correct or contradict them."

The second passage is from the speech of Lord Morris at page 113 in *Ridge* v. *Baldwin*[3] which is as follows:

"It is well established that the essential requirements of natural justice at least include that before some one is condemned he is to have an opportunity of defending himself, and in order that he may do so that he is to be made aware of the charges or allegations or suggestions which he has to meet; see *Kanda* v. *Government of the Federation of Malaya*."

Third, Mr. Marjoribanks cited *Durayappah*[4] as authority for the proposition that even if the words of a statute clearly give a Minister power to dissolve a local council, he must nevertheless give the council an opportunity to explain before dissolving it and that the fact that there was urgency in dissolving the council was immaterial.

The word "heard" in clause (2) of article 135 of the Constitution and in paragraph 27 of Cap. D is derived from the word "hear" which is not defined in the constitution which governs this matter; in view of that we think that it should be given its ordinary everyday meaning. No doubt "to hear" is according to the Shorter Oxford Dictionary "to listen to; to give ear to; hearken to; to give audience to" — all of which imply that the plaintiff must be given facilities to make representations that could be perceived through the defendants' *ears*, not eyes, but that Dictionary also gives the following definitions of to hear: "to be informed of; to be informed; to learn." This makes clear that a hearing does not necessarily mean an oral

hearing. Thus in the ordinary way one speaks of hearing from a friend from whom one has received a letter, the words of which make an impact on one not through one's ears but through one's eyes.

We find support for our view in the words of Lord Loreburn L.C. at page 182 in *Board of Education* v. *Rice*: [5]

"Comparatively recent statutes have extended, if they have not originated, the practice of imposing upon departments or officers of State the duty of deciding or determining questions of various kinds. In the present instance, as in many others, what comes for determination is sometimes a matter to be settled by discretion, involving no law. It will, I suppose, usually be of an administrative kind; but sometimes it will involve matter of law as well as matter of fact, or even depend upon matter of law alone. In such cases the Board of Education will have to ascertain the law and also to ascertain the facts. I need not add that in doing either they must act in good faith and fairly listen to both sides, for that is a duty lying upon every one who decides anything. But I do not think they are bound to treat such a question as though it were a trial. They have no power to administer an oath, and need not examine witnesses. They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view."

Here too when deciding whether or not to dismiss the plaintiff the defendants were deciding a matter to be settled by discretion, involving no law, namely an administrative matter, and they are not bound to treat such a matter as a trial, they had no power to administer an oath and need not examine witnesses; all they had to do was to give a fair opportunity to the plaintiff for correcting or contradicting any relevant statement prejudicial to his view, of which here there is no question.

In *Mahadevan* v. *Anandarajan and Others*,[6] an appeal from here involving the expulsion of a pupil from a school in Seremban, Lord Diplock giving the advice of the Judicial Committee said in his last paragraph —

"In relation to such administrative matters as the expulsion of a pupil from a school it would be quite inappropriate to model the procedure on that of a criminal trial. All that natural justice requires is that the person charged with making the decision should act fairly."

Then His Lordship added significantly —

"What is fair depends on the circumstances and is a matter of common sense."

In *Regina* v. *Aston University Senate, Ex parte Roffey and Another*[7] where some students had been expelled by a university for failing their examinations, counsel for the university conceded that the concept of natural justice applied and Donaldson J., delivering the main judgment of the Divisional Court, held that before expelling them the university should have given them a reasonable opportunity of being heard, but he did not say that they must necessarily be given an oral hearing; on the contrary he said at page 554 that they "should be given an opportunity to be heard either orally or *in writing*, in person or by their representatives as might be appropriate."

There is no evidence here that the plaintiff ever demanded an oral hearing before his dismissal. If he had and been refused, then probably he would have had a stronger case, but as it is he is in the same weak position as Mr. Fernando in *Ceylon University* v. *Fernando*[8] where Lord Jenkins, giving the advice of the Privy Council, quoted with approval at page 232 the following words of Harman J. (as he then was) in *Byrne* v. *Kinematograph Renters Society Ltd.*: [9]

"What then are the requirements of natural justice in a case of this kind? First, I think that the accused person should know the nature of the accusation made; secondly, that he should be given an opportunity to state his case; and, thirdly, of course, that the tribunal should act in good faith. I do not myself think that there really is anything more."

Here the plaintiff does not say that he did not know the nature of the accusation made against him by Government; he was given an opportunity to state his case, albeit in writing; and he does not say that the defendants did not act in good faith. His only complaint is that he was not given an oral hearing; but there is no evidence that he ever asked for one either before his dismissal or soon thereafter. Indeed he waited a year before filing his suit.

Therefore in our opinion the defendants have followed the correct procedure when dismissing the plaintiff and his appeal should and is accordingly dismissed, with costs.

To sum up, our answers to the three issues are as follows:

(a) Where the defendants could have proceeded against the plaintiff either under Cap. D or the 1970 regulations, they were within their rights in choosing to proceed against him under Cap. D;

(b) When proceeding against him under Cap. D the defendants should have given him a reasonable opportunity of being heard; and

(c) In the circumstances of this case, an oral hearing was unnecessary and the defendants have given the plaintiff a reasonable opportunity of being heard.

Appeal dismissed.

Solicitors: *Lovelace & Hastings.*

CANTRANS SERVICES (1965) LTD. v. CLIFFORD

[F.C. (Azmi L.P., Ali and Ong Hock Sim F.JJ.) March 1, 1974]

[Kuala Lumpur — Federal Court Civil Appeal No. 49 of 1973]

Practice and Procedure — Leave to serve writ out of jurisdiction — Application to set aside order — Contract made subject to law of Canada — No proof that defendant has property within jurisdiction — R.S.C. 1957, O. 11 r. 1(j).

This was an appeal from the decision of a judge of the High Court dismissing the appellants' application to set aside the order of the Senior Assistant Registrar granting the respondent leave to issue a writ of summons and to serve notice thereof in Canada, outside the jurisdiction of the court. The contract between the parties expressly declared that the contract was to be deemed to be made in British Columbia, Canada. It was conceded that the breach of contract took place in Canada. The respondent admitted that the appellants are a limited company incorporated and resident in Canada with no registered place of business in Malaysia. He however based his claim on O. 11 r. 1(j) of the Rules of the